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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 766

HUDSON & MANHATTAN RAILROAD COMPANY,
Appellant,

against

CITY OF JERSEY CITY, AND FRED M. VINSON, Economic Stabilization Director, by CHESTER BOWLES, Price Administrator,
Appellee.

Answer of Appellee, City of Jersey City, to the Petition of the Appellant, Hudson & Manhattan Railroad Company, for Rehearing of Motion to Dismiss Appeal from Interlocutory Injunction and of Order Dismissing Its Appeal.

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CHARLES HERSHENSTEIN,
Of Counsel.

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The appellee, City of Jersey City, in answer to the petition of appellant, Hudson & Manhattan Railroad Company, for rehearing of the motion to dismiss its appeal from the interlocutory injunction heretofore granted and of the order of this Court dated April 3, 1944, granting said motion, respectfully shows as follows:

1. The *Per Curiam* opinion dismissing the appeal herein upon the authority of *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588-9; *Sterling* v. *Constantin*, 287 U. S. 378, 386, is applicable to the facts in the case at bar.

2. The fact that appellant appealed, as a matter of right, from the granting of the interlocutory injunction and

appealed subsequently, as a matter of right, from the granting of a final injunction does not alter the fact that the interlocutory injunction became merged in the final injunction.

3. The holding of this Court upon the authority of *Smith* v. *Illinois Bell Telephone Co.* and *Sterling* v. *Constantin, supra,* is based upon the reasoning that the *subject matter* of the appeal from the interlocutory injunction became moot as soon as the interlocutory injunction became final and not, as contended by the appellant, upon the theory that when the appeal was taken from the final injunction appellant's *right to appeal* from the interlocutory injunction was extinguished. The remedy of appeal, as a matter of right, from an interlocutory injunction is effective in those cases where the statutory court has not yet rendered its decision upon final hearing, or where no appeal from a final decree has yet been taken.

4. The provisions of Rule 65 C of the Federal rules of procedure have no application to the question as to when the subject matter of an appeal from an interlocutory injunction becomes moot. In any event, the provisions of Rule 65 C of the Federal rules of procedure are not applicable to the case at bar by reason of the fact that said rule provides "no such security shall be required of the United States or of an officer or agency thereof." Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, was a plaintiff, by intervention, in this cause. The interlocutory injunction issued in his favor did not require the furnishing of a bond. The injunction, once issued, enures to the benefit of all plaintiffs, whether or not another plaintiff filed a bond. Rule 65 C does not, *ipso facto,* give appellant the right to sue for damages, because Rule 65 C is merely

a security clause and by itself does not give a party an absolute right to a recovery of damages. Furthermore, as we have heretofore stated, since an agent or officer of the United States Government is a party to these proceedings no security was required in this case.

5. To appellant's contention that in any event it is entitled to a determination by this Court as to whether the interlocutory injunction was wrongfully issued as a basis for a damage suit, we submit that no action which this Court may take upon the appeal from the interlocutory injunction can directly affect the position of the appellant for the period of time which elapsed during the pendency of the interlocutory injunction. This Court could be concerned only with the question of the continuance in effect or the abrogation of the then existing final injunction which naturally superseded the operative effect of the interlocutory injunction.

6. Appellant in its petition, paragraph VI, sets out further reasons why this Court should entertain the application for a rehearing of the motion to dismiss.

Answer has already been made to sub-division (a).

As to sub-division (b), it has never been contended by appellee, City of Jersey City, that a municipality is exempt from the provisions of Rule 65 C, but as already stated, since an officer or agent of the United States Government was a party to these proceedings the lower court dispensed with the filing of a bond.

Replying to sub-division (c), the interlocutory injunction was granted both to the intervening plaintiff, Fred M. Vinson, Economic Stabilization Director, by Chester Bowles, Price Administrator, and the City of Jersey City. No question has arisen in the court below or at any stage

in these proceedings that the City of Jersey City lacked authority to give security required by Rule 65 C.

As to sub-division (d), nowhere in the proceedings in the court below nor in the opinion rendered by this Court does it appear that the lower court abused its discretion in granting the interlocutory injunction. In the opinion rendered by this Court upon the appeal from the final injunction no mention is made of any irreparable damage suffered by the appellant.

It is further argued by appellant that the motion to dismiss the appeal was not made by the appellee, City of Jersey City, upon the cited cases of *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588-9; *Sterling* v. *Constantin*, 287 U. S. 378, 386. This statement is inaccurate. The Court's attention is respectfully directed to the memorandum of the City of Jersey City submitted in opposition to the motion in the alternative by appellant to correct diminution of record, Point II, page 5, wherein this appellee specifically contended that the question of the issuance of the interlocutory injunction was moot upon the authority of *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 588-9.

7. Appellant again urges that it should be entitled, as of right, to an appeal from the interlocutory injunction and to a determination by this Court whether such interlocutory injunction had "*wrongfully*" issued, since such determination is an indispensable condition precedent to the right to recover damages either under Rule 65 C or in a suit for malicious prosecution. The appellant is therefore seeking a determination of a moot question in order to predicate thereon a course of action for damages. It is significant that in determining that the final injunction should be set aside this Court did not find that such injunction was "*wrongfully*" issued in the sense in which that word is used by the appellant, namely, a basis for a suit for damages.

The real motive of appellant in making this application is apparent. It seeks a determination from the highest court in the land upon a question entirely moot to aid it in prosecuting a claim for damages against the municipality who dared to use honestly and courageously all legal means available to it to prevent an increase of fares on behalf of the people it represents. We urge and respectfully submit that the railroad company is not justified in asking this Court to lend its dignity towards aiding the railroad company in the prosecution of a suit for damages.

The matter of increased fares for the Hudson & Manhattan Railroad Company has been the subject of investigation by the Interstate Commerce Commission for years. It was the duty of the officials of Jersey City, as well as of the Director of Economic Stabilization, to take whatever legal steps were available to them to see that a reasonable fare was charged in using the facilities of the appellant. To permit appellant to exact increases, as it has steadily attempted to do, without a contest, would have rendered the officials of the city derelict in their duty. The City of Jersey City was successful in all of the previous litigation, except in the present instance. Can it be seriously contended by this appellant that the granting of the interlocutory injunction was either wrongful or malicious?

We respectfully submit that the petition of the appellant, Hudson & Manhattan Railroad Company, for the rehearing of the motion to dismiss and of the order dismissing this appeal be denied.

Charles A. Rooney,
Attorney for Appellee,
City of Jersey City.

Charles Hershenstein,
Of Counsel.